IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

FRIDAY, THE 15TH JUNE 2007 / 25TH JYAISHTA 1929

CRP.No. 1324 of 1994(A)

CMA.37/1988 of III ADDL. DISTRICT COURT, ERNAKULAM
OS.298/1994 of PRL.M.C.,ERNAKULAM
.....

REVN. PETITIONER: RESPONDENT IN THE LOWER COURTS

*** A.S.IBRAHIMKUTTY, S/O. LATE A.K.SYED MOHAMMED STATIONARY MERCHANT, BROADWAY, ERNAKULAM.(DIED)**

SUPPL.PETITIONERS 2 TO 5 IMPLEADED

2. RAMLATH BEEVI, W/O.LATE A.S.IBRAHIMKUTTY, ALUNGAPARAMBIL HOUSE, S.R.M.ROAD, ERNAKULAM.

3. AYSHA ASHRA, D/O.LATE A.S.IBRAHIMKUTTY, -DO- -DO-

4. SHAFEENA AHSRAF, D/O.LAGE A.S.IBRAHIMKUTTY, -DO- -DO-

5. TAJUDHEEN, S/O. LATE A.S. IBRAHIMKUTTY, -DO- -DO-

SUPPLEMENTAL PETITIONERS 2 TO 5 ARE IMPLEADED AS THE LEGAL HEIRS OF THE DECEASED 1ST PETITIONER VIDE ORDER DT. 17.6.03 IN IA. 128/03.

BY ADV. SRI.P.N.KRISHNANKUTTY ACHAN(SR.)
SMT.M.HEMALATHA
SRI.K.MOHANAKANNAN

CRP. NO.1324/1994

RESPONDENT: APPELLANT IN THE LOWER COURT
---------- PETITIONER IN THE TRIAL COURT

SMT.SUBAIDA D/O.LATE N.M.ABDUL KADER
AND W/O.DR.A.A.ABDUL MAJEED,
FORT COCHIN, NOW RESIDING AT
PULLEPPADY, PULLEPPADY,
THAMMANAM ROAD, ERNAKULAM.

BY ADV. SRI.A.K.SESHADRI
SMT.K.P.SREELAJA(ADV.COMMR.)

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 15/06/2007, ALONG WITH SA NO. 673 OF 1994 CRP NO. 2594 OF 1994 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

J.B.KOSHY & K.P.BALACHANDRAN, JJ.

C.R.P.NOS.1324 & 2594 OF 1994 (A)
&
S.A.NO.673 OF 1994 (E)

Dated this the 15th day of June, 2007

O R D E R

KOSHY,J.

Respondent in the revision petition as well as in the second appeal filed O.S.No.298/1984 in the Munsiff Court, Ernakulam, praying for a decree of permanent injunction to restrain the revision petitioner from making any new constructions in the plaint schedule property and from subletting or assigning the tenancy right in favour of strangers. Temporary injunction was also granted. According to the plaintiffs the decree schedule property was purchased by Ext.A13 Sale deed. They also paid additional court fee on the issue of title. The case of the plaintiff was that the building in the plaint schedule is outstanding on lease with the defendants. At the time of granting the lease, there was some vacant space on the rear portion of the building and a godown was constructed in that vacant plot in 1137 M.E. which was also

let out to the defendant's predecessor. This is denied by the Revision petitioner. In the trial court the respondent herein (the plaintiff) filed I.A.No.1614/1985 to take action against the Revision Petitioner for making construction in violation of the temporary injunction issued in I.A.No.1242/1984. The trial court decreed the suit, but dismissed I.A.No.1614/1985 finding that there is no evidence to show that any construction is made in violation of the temporary order of injunction. The Revision petitioner herein filed A.S.No.121/1990 against the decree and judgment in O.S.No.298/1984. The plaintiff, the respondent herein filed C.M.A.No.37/1988 against the order of dismissal of I.A.No.1614/1985. Both appeals were heard by the Lower Appellate court and disposed of by a common judgment dated 24.12.1993. The plaintiff, respondent herein filed I.A.No.2071/1993 in the Lower Appellate court to amend the prayer in I.A.No.1614/1985 to add a prayer for mandatory injunction to demolish the new construction made by the Revision Petitioner which was allowed. In C.M.A.No.37/1988, the Lower Appellate Court granted mandatory injunction

directing the removal of new construction made by the defendants. Against the judgment and decree in A.S.No.121/1993 S.A.No.673/1994 was filed. Against the order in C.M.A.No.37/1998 C.R.P.No.1324/1994 was filed.

2. Plaintiffs in the suit also filed a petition for eviction of the predecessor of the petitioners in C.R.P.No.2594/1994 by filing R.C.P.No.22/1981. The original tenant, late A.K.Syed Mohammed took a two storied building on rent by Ext.A1 deed in the year 1105 M.E for a monthly rent of Rs.15/-. As per Ext.A1, what is leased is the two storied building, vacant land and all structures in the land purchased by the plaintiff as per Ext.A13 Sale deed. Late A.K.Syed Mohamemd had taken the building next adjacent to it also from its owner, Sri.S.Koder on rent. Both the buildings were used as a single unit for the business of late A.K.Syed Mohammed. In 1950's, late A.K.Syed Mohammed left the business due to old age and his eldest son, late A.S.Hameed took over the business in both the buildings together as a single unit. In 1967, A.S.Hameed died, leaving

his widow, the 2nd respondent herein and his very young children. According to the revision petitioners while so, father of the revision petitioners, who is none other than the youngest brother of late A.S.Hameed, on the advice of his father, joined the business with the 2nd respondent herein, in partnership, and was carrying on the business in the name of A.S.Hameed. In 1971, the first respondent filed R.C.P.No.77/1971 against the revision petitioner, the 2nd respondent and other heirs of late A.S.Hameed, evidenced by Ext.B1 on several grounds, including subletting. That R.C.P. was compromised as per Ext.B5 dated 31.1.1976, whereby the revision petitioner and the 2nd respondent, who were the partners of firm 'A.S. Hameed' were recognised as tenants, and the rent was increased from Rs.80/- to Rs.200/- per mensum. Later revision petitioner purchased the adjacent building belonged to Sri.S.Koder. In 1981, 1st respondent filed R.C.P.No.22/1981 in the Rent Control Court, Ernakulam for eviction of the revision petitioners and the 2nd respondent on the grounds of (a) arrears of rent under Section 11(2),

(b) tenants ceased to occupy the building for more than six months (Section 11(4)(v)) and (c) use of the building in such a manner as to reduce or destroy its value and utility materially and permanently (Section 11(4)(ii)). It was alleged that a godown was constructed by the 1st respondent adjacent to the petition schedule building on its eastern side, which is not occupied by the 2nd respondent and revision petitioner was occupying the same. The use of the building in such a way to reduce its value and utility was alleged on the averment that a door on the eastern side of the petition schedule building was closed. According to revision petitioner godown was not constructed in the plaintiff's property. It belonged to Sri.S.Koder and it was purchased by the revision petitioner. The door on the eastern side of the petition schedule building was closed for the purpose of separation of the business and by that reason the value and utility of the petition schedule building is not in any way affected. Since the ownership of the godown itself was disputed plaintiffs were compelled to file O.S.No.298/1984. In the above judgment permanent injunction

was granted after holding that title of the property was with the plaintiffs. The above judgment and decree was confirmed in A.S.No.120/1990. Rent Control court ordered eviction under Section 11(4)(ii) and 11(4)(v) of the Rent Control Act, with a further direction that the revision petitioner will be entitled to recover possession of the godown premises if ultimately Ext.A1 (O.S.No.298/1984) is finally decided in his favour. Appellate authority confirmed the order of the rent controller in R.C.A.No.156/1992 and from the above judgment C.R.P.2594/1994 is filed. Only dispute pressed by the petitioners in Rent Control proceedings and C.R.P.No.2594/1994 is that the plaintiff (1st respondent in C.R.P.) has no title over the property where godown was constructed, as they have purchased the above from S.Koder. By the judgment in O.S.No.298/1984 and A.S.No.121/1990 it is clear that revision petitioners have no title over the property where godown is constructed and ownership is vested with the 1st respondent, landlord. Revision Petitioner failed to prove that they purchased the property where godown was

constructed from K.S.Koder. Since title to the property was declared in favour of the plaintiff in O.S.No.298/1984 which was confirmed in appeal. C.R.P.No.2594/1994 is liable to be dismissed, unless they are able to interfere the S.A.No.673/1994. Hence Second Appeal was also posted along with C.R.P.

3. The matter was argued at length before another Division Bench. The Division Bench after discussing with the parties to a compromise the cases if possible. Thereafter parties agreed for a settlement which is recorded by the court as follows:

> "The dispute essentially pertains to title, ownership and possession of a small parcel of land in which there is godown, admittedly situated on the east of the two storyed building, which is part of the plaint schedule, in survey No.784/3 of Ernakulam Village. Both parties claim that there is godown at their rear side. After addressing the Court extensively, both sides have expressed their willingness to settle the whole dispute once for all. It is submitted that the parties agree to have their respective eastern portion lying contiguous to their building. To be put in clearer terms parties agree to share respective

> eastern portion of the godown. We appoint Adv.S.Easwaran for further follow up action in the matter of settlement, as Advocate Commissioner."

The Commissioner after visit filed a report and also Annexure A2 sketch. In Annexure A2, disputed godown is mentioned and the both parties agreed that the disputed godown can be with the plaintiff itself. The disputed godown is marked in yellow colour in the Commission report. The defendant in the suit (Revision petitioner herein) will have no right in the godown and it will be with the plaintiff. First respondent plaintiff can deal with her property and the godown constructed just behind her two storied building and revision petitioners or nobody under them can claim any right over it. In view of the above and submissions made before this Court by the counsel for the petitioners, nothing further has to be considered and C.R.P.No.2954/1994 is liable to be dismissed. But no written statement was filed. Hence we shall consider the C.R.P. on merits only. Commissioner reported that no settlement was arrived with regard to some open space behind the godown.

According to petitioners (defendants in the suit) that portion of the plaint schedule property was purchased by them as per Ext.B1 sale deed. But according to the plaintiff it is part of the property purchased by them as per Ext.A13 sale deed. Therefore we have to deal with that question in S.A.No.673/1994 in detail.

4. Plaint schedule property scheduled in the decree is as follows:

Schedule

Ernakulam	-	District
Kayamkulam	-	Taluk
Ernakulam	-	Village
Kovilvattom	-	desom
784/3	-	Sy.No.

Description of property:

Properties measuring about 3cents in

extent with 188 links on the north. 12 links on the east, 189 links on the south and 17 links on the west with two storied building - 950 (new) with ground floor and first floor and a single storied godown building on the back. (east)

Boundaries:

East	-	Synagogue
South	-	S.S.Koder building
West	-	Broadway Road
North	-	S.S.Koder Building

So the entire decree schedule property was in that Survey Number 784/3. Defendants case was that they purchased the plaint schedule property from Sri.S.Koder by Ext.B1 deed and constructed the godown just behind the plaintiff's two storied building. In the first written statement 1st defendant did not deny the title of the plaintiff. In the amended written statement it is contended by the 2nd defendant as follows:

“The boundary measurements of the plaintiff's

property as stated in the plaint schedule are false. In fact the boundary measurements of the plaintiff's property are 105 links each on the north and south, 18 links on the east and 17 links on the west. Beyond the area covered by the aforesaid measurements the plaintiff has no other property in the vicinity of the plaint property. The plaintiff's predecessor - in - interest also had no possession over any portion of the property, beyond the area as per the measurements mentioned above. The second defendant is the owner in possession of 3 ares 17 sq. metres of property with a double storeyed building and a godown therein, lying on the northern and eastern sides of the plaintiff's property, by virtue of sale deed executed in his favour by S.S.Kodar in the year 1971. Ever since the date of purchase, the aforesaid item of property is in the absolute possession and enjoyment and also ownership of the second defendant. The averments in the plaint that on request a godown was constructed on the vacant site on the rear side of the property and the rent was enhanced from Rs.57.50 to Rs.80/- per month from 1137 M.E. and that the matter was finally settled by allowing the defendants to continue on enhanced rent of Rs.200/- per month for the building which included the two storeyed building and the godown at the back and additional facilities like rolling shutters were provided at the expense of the plaintiff are absolutely false. Neither the plaintiff nor her predecessor -in - interest constructed any godown on the rear side as claimed in the plaint. The godown in dispute belonged to S.S.Kodar and it was let out to the second defendant's father along with a two storeyed building. It is true that the plaintiff filed R.C.P.77 of 1971 against the defendants herein. In that R.C.P. the plaintiff herein set up a false case that the godown on the rear side belonged to her. The second defendant as respondent in the said R.C.P. contended that the

> godown was purchased by him along with the adjacent items of properties and buildings and that the plaintiff has no right, title or interest over the same. It is true that the said R.C.P. was settled but not as stated by the plaintiff."

According to the 2nd defendant he has purchased the godown from Koder in 1971 as per Ext.B1 sale deed. Prior title deeds of Sri.S.Koder are Ext.A10 sale deed and Ext.A11 partition deed. It did not mention survey number of the plaint schedule property or take in any area which comes within the boundaries relied upon by the plaintiff. According to the 2nd defendant, his father has lease hold right in respect of the godown in question under the said Koder. But his father had no such case in the earlier proceedings. This is evidenced from Ext.A7 reply notice dated 16.10.1968 which was sent in response to a notice prior to the institution R.C.P.77/1971. Ext.A6 is the copy of the notice. In this connection it is significant to note that in Ext.A6, the plaintiff has asserted her title to the disputed godown on the entire area. Ext.A4 is the copy of petition in R.C.P.77/1971. There also the plaintiff has asserted the title of the land behind

the plaintiff's two storied building and the disputed godown was constructed in the land purchased by Ext.A13 deed. Ext.A5 is the copy of objection filed by the defendants herein along with other respondents, in the above R.C.P. The second defendant's pleading and his evidence as DW1 along with Ext.A4 show that the plaint schedule property was the subject matter in the above R.C.P. It may be noted that the second defendant's present case based on Ext.B1 sale deed is significantly absent in Ext.A5 objection. Ext.A5 objection was filed after Ext.B1 sale deed. If they have purchased the land behind to the plaintiff's two storied building from S.Koder, that case would not be compromised by agreeing to pay higher rent. The appellate authority considered the matter and found as follows:

> “Ext.A14 is the copy of the compromise petition filed by the plaintiff and defendants in R.C.P.77/71. In fact the defendants who were the counter petitioners in R.C.P.77/71, without disputing the title of the plaintiff over the godown portion, agreed to pay enhanced rent at the rate of Rs.200/- per mensum and on the basis of the above compromise the Court passed an order striking off the R.C.P. from the file. Ext.A15 is

> the copy of the order passed by the Rent Control Court in R.C.P.77/71 recording Ext.A14 compromise and striking off the R.C.P. Ext.A14 compromise was filed before Court on 3.1.1976. Even though the 2nd defendant obtained Ext.B1 sale deed in 1971, he did not put forward any claim of title over the godown portion even in 1976 when he filed Ext.A14 compromise. All these circumstances would clearly reveal that the 2nd defendant was admitting the title of the plaintiff over the godown."

With regard to Ext.B1 both courts concurrently found that the plaint schedule property is not covered by it. Appellate court in paragraph 19 held as follows:

> "Ext.B1 is the sale deed in favour of the 2nd defendant executed by S.S.Kodar on 20.5.1971, conveying properties in Survey No.784/1, 2, 3, 4, 5 and 7. In this document 43 sq. metres of property in Sy.No.784/3 is seen included. Ext.B1 refers to a two storied building and a godown just on the back of the above two storied building. It is in evidence that the above mentioned two storied building belonging to Kodar and situated on the northern side of the two storied building of the plaintiff was in possession of the 2nd defendant as per a lease arrangement with S.S.Kodar. The description of the properties in Ext.B1 would show that the godown mentioned in Ext.B1 was lying on the back side of the two storied building assigned as per Ext.B1 document. Ext.B1 did not mention any godown which was situated on the back side of the two storied building belonging to the

> plaintiff. A careful description of the properties in Ext.B1 would clearly reveal that the godown mentioned in Ext.B1 was the one situated on the back side of the two storied building assigned to 2nd defendant as per Ext.B1 and not with respect to the godown situated on the back of the plaintiff's two storied building."

We agree with the above findings. After considering Ext.B1 and title deeds Exts.A10 and A11, it can be seen that S.S.Kodar was not having any right over any portion of the property in Sy.784/3 and property in Sy.784/3 was included in Ext.B1 fraudulently. Plaintiff produced the title deeds in favour of S.S.Kodar, that is, Exts.A10 and A11, to prove that S.S.Kodar had no title over any portion of Sy.784/3. Ext.A10 is the sale deed in favour of S.S.Kodar dated 30.10.57 with respect to properties in Sy.784/1, 2, 4 and 785/7. No portion of property in Sy.784/3 was included in Ext.A10. The southern boundary is shown as property in Sy.784/2 and the northern boundary of Sy.784/4 was described in Ext.A10 as Sy.748/3. The above description of the properties also would clearly show that Sy.784/3 was not included in Ext.A10. Ext.A11 is a partition

deed executed by S.S.Kodar and the members of his family on 1.12.1125. This document also did not include Sy.784/3. Thus Exts.A10 and A11 would clearly reveal that S.S.Kodar was not having any title over any portion of property in Sy.784/3. With regard to the open space behind the disputed godown in fact in the written statement filed by the 1st defendant and 2nd defendant, no defence based on title was raised and all contentions were raised with regard to godown which was subsequently rejected.

5. The plaintiff claimed right and title over 3 cents of property in Sy.No.784/3 and over the two storied building and the godown on the back of the two storied building (on the eastern side). As Bava, the predecessor in interest of the plaintiff, obtained the plaint property and the two storied building as per Ext.A13 sale deed dated 16.9.1101. The extent of the property was not mentioned in Ext.A13, but the eastern boundary of the property was mentioned as property belonging to the Synagogue and western boundary as Broadway. Syed

Mohammed the predecessor of defendants got on lease the above two storied building and the property covered as per Ext.A13 document, on lease as per Ext.A1 Coolicharthu executed by him on 26.10.1197 in favour of A.S.Bava. In Ext.A1 property is described as follows:

Ext.A1 document which was executed in 1107 ME clearly disclosed that there was same vacant portion of land on the back side of the two storied building (ie. on the western side of the building) in the possession of A.S.Bava and that portion was also taken possession of by Syed Mohammed, the predecessor in interest of the defendants. Ext.A1 was executed by the tenant admitting the right and possession of the landlord over the vacant portion of land lying on the back side of the two storied building and agreeing to pay rent. No reasons are there

to doubt the correctness of the recitals in Ext.A1 which was executed as early as in 1107 ME. Two storied building mentioned in Ext.A1 are the same mentioned in plaint schedule. Ext.A16 will also show the title to the plaint schedule property as per Ext.A13 is vested on the plaintiff. In fact the defendants were paying rent to the plaintiff with respect to the plaint schedule godown also from 1137 ME onwards, admitting the plaintiff's title over the godown. The available documents and the circumstances would clearly establish that the godown belong to the plaintiff and the defendants were occupying the godown as tenants under the plaintiff and claim of title put forward by the 2nd defendant is without any basis and bonafides and that cannot be accepted. It is the case put by the 2nd defendant that plaint schedule property was purchased by him for S.S.Koder and S.S.Koder did not possess any land in Sy.No.784/3, hence he cannot sell the same. Court below has considered the evidence and come to the right conclusion on the basis of findings of facts based on oral and documentary evidence adduced in this case that the title of the land covered

by plaint schedule property in Sy.No.784/3 vests on the plaintiff. No substantial question of law is also raised so as to interfere in second appeal. If there is any dispute over the property which are not covered by the decree schedule property, it is for the parties to file fresh suit with regard to the same. Since we have held that plaint schedule property vested with the plaintiff and he has absolute title over the property, he can deal with all structures within the plaint schedule property and no interference is needed in the order passed in C.M.A. also. But we are not making any observations with regard to property and structures if any situated outside the plaint schedule property. With the above observations C.R.P.No.2594/1994, C.R.P.No.1324/1994 and second appeal No.673/1994 are dismissed.

J.B.KOSHY, JUDGE

K.P.BALACHANDRAN, JUDGE

prp

J.B.KOSHY & K.P.BALACHANDRAN, JJ.

C.R.P.NOS.1324 & 2594 OF 1994 (A)
&
S.A.NO.673 OF 1994 (E)

J U D G M E N T

15th June, 2007